NO. 21295

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

OSVALDO LUGO,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

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I

JURISDICTIONAL STATEMENT

This is an appeal from the order of the United States District Court for the Southern District of California, adjudging appellant to be in violation of probation in a criminal case.

The original offense and the probation revocation proceeding occurred in the Southern District of California. The District Court had jurisdiction by virtue of Title 18, United States Code, Sections 3231, 3651, and 3653, and Title 26, United States Code, Section 4724(a). Jurisdiction of this Court rests pursuant to Title 28, United States Code, Sections 1291 and 1294.

II

STATEMENT OF THE CASE

On May 18, 1965, appellant entered a plea of guilty to a charge of importing approximately ten grams of heroin into the United States without registering and paying the special tax, in violation of Title 26, United States Code, Section 4724(a) [C. T. 4, 6]. 1/

Thereafter, on August 13, 1965, appellant appeared before United States District Judge Fred Kunzel for sentencing and was committed to the custody of the Attorney General for three years and execution of the sentence was suspended with appellant being placed upon probation for a period of three years [C. T. 7].

On March 11, 1966, a hearing was completed upon an order to show cause why appellant's probation should not be revoked. The probationary order was revoked upon the same date, and appellant was then committed to the custody of the Attorney General for three years [C. T. 8].

Appellant subsequently filed a notice of appeal [C. T. 9-10].

III

ERROR SPECIFIED

Appellant has specified one point upon appeal:

"1. The Revocation of Probation by the District

1/ "C. T." refers to the Clerk's Transcript of Record.

Court amounted to an abuse of discretion, since the evidence is not sufficient to show that appellant violated any of the terms of his probation:

"(a) Since the testimony of Agent Miller as to the conversation between appellant and a codefendant should have been excluded:

"(1) Agent Miller was permitted to give his English translation of the conversation that took place in Spanish; this prejudiced appellant because he was unable to test the accuracy or inaccuracy of the translation, with the underlying Spanish words not remembered by the witness.

"(2) Agent Miller was permitted to testify after refreshing his recollection from an English translation, even though this refreshing did not cause him to remember the underlying Spanish words, but only the translation (which he had forgotten).

"(3) The inability of the Government to produce Agent Miller's original rough notes of this conversation (since they had apparently been destroyed) was a violation of the Jencks Act, and the testimony should have been stricken.

"(b) The coercion of the codefendant in appellant's first trial by the District Court was prejudicial to appellant in the second trial (notwithstanding the grant of appellant's motion for a new trial), since

appellant was unable (as a practical matter) to call the codefendant as a material defense witness in the second trial, as a result of the coercion."

(Appellant's Opening Brief, pp. 6-7.)

IV

STATEMENT OF THE FACTS

On May 18, 1965, appellant was convicted of importing approximately ten grams of heroin into the United States without payment of the special tax. On August 13, 1965, he was committed to the custody of the Attorney General for three years, execution was suspended, and he was placed upon probation for three years [C. T. 4, 6, 7].

The terms of probation were that appellant "obey all laws, Federal, State and Municipal, that he comply with all lawful rules and regulations of the Probation Department, that he not use barbiturates, marihuana or narcotics in any form, that he not associate with known users of or dealers in barbiturates, marihuana or narcotics in any form, and that he not enter Mexico nor approach the Mexican Border, and that he at his own expense submit to such tests as the Probation Department shall determine to determine his use of narcotics" [C. T. 7].

On February 2, 1966, appellant was convicted of aiding, abetting, etc., the smuggling of heroin; aiding, abetting, etc., the concealment, etc., of heroin; and concealing, etc., heroin.

These convictions followed trial in the United States District Court, San Diego, with Judge Kunzel presiding [R. T. 269, 276, 287]. [2] An appeal from these convictions is now pending in this Court, No. 21162.

On March 4, 1966, a hearing commenced upon an order to show cause why appellant's probation should not be revoked. Judge Kunzel considered the evidence that was heard in the trial of the case that was completed on February 2, 1966 [R. T. 3, 7, 17-18]. [3] The probationary order was revoked on March 11, 1966 [C. T. 8].

Rather than burden this Court with a lengthy recital of the evidence heard in the jury trial which ended in the convictions of February 2, 1966, appellee will follow the procedure adopted by appellant and incorporate by reference the Statement of the Facts appearing in Appellee's Brief filed in this Court in Case No. 21162, pp. 4-10.

2/ "R. T." refers to the "Reporter's Transcript on Appeal". Although there is a conflict between appellant's Designation of Record on Appeal [C. T. 13] and the Index to the Clerk's Transcript of Record, appellee joins in appellant's assumption that the record upon appeal includes all of the Reporter's Transcript in the appeal from Case No. 36120-SD-Criminal.

3/ There is a duplication of numbers in the Reporter's Transcript on Appeal. Any references in this brief to pages 1-20 of the Reporter's Transcript will refer to the proceedings of March 4 and March 11, 1966.

V

ARGUMENT

A. THE TRIAL COURT DID NOT COMMIT ERROR IN THE TRIAL OF CASE NO. 36120-SD-CRIMINAL.

Appellant contends in this appeal, as well as the appeal in Case No. 21162, that the trial Court committed a number of errors in the trial of Case No. 36120-SD-Criminal, which trial resulted in appellant's convictions of February 2, 1966.

It is respectfully submitted that the trial Court committed no error by receiving the testimony of Officer Miller in Case No. 36120-SD-Criminal. Appellee's position is based upon each of the following reasons:

1. Miller testified from his existing memory, not from past recollection recorded [R. T. 149].

2. A witness may testify concerning the substance of a conversation and need not remember the exact words used in the conversation.

3. The fact that a witness has destroyed some notes does not require exclusion of his testimony under the facts of this appeal.

The alleged coercion of the co-defendant also did not involve error in Case No. 36120-SD-Criminal, for each of the following reasons:

1. The co-defendant was willing to testify for appellant

and could have done so with the inadmissible impeachment matter, if such existed, being excluded from the evidence.

2. Appellant failed to raise the issue in a timely fashion in the trial Court or at any time during the trial. He raised the question of coercion but did not raise the question now before the Court until nine days after the convictions [R. T. 79-80, 287, 290-91].

The above-mentioned contentions are discussed at greater length, with citation of authorities, on Pages 10-20 of Appellee's Brief in this Court in Case No. 21162.

B. ASSUMING, ARGUENDO, THAT THE TRIAL COURT ERRONEOUSLY RECEIVED OFFICER MILLER'S TESTIMONY, THIS DID NOT CONSTITUTE ERROR IN THE INSTANT APPEAL.

Assuming, for purposes of argument only, that Investigator Miller's testimony should not have been received in the criminal proceeding, error was not thereby committed in the probation revocation hearing, for each of the following reasons:

1. Miller's testimony was not required in regard to Count Four of the indictment, No. 36120-SD-Criminal, due to the statutory possession presumption under Title 21, United States Code, Section 174. Appellant had been in possession of the heroin alleged in Count Four [R. T. 111-12, 216-17], and he was convicted under that count, among others [R. T. 287]. This alone constituted a violation of

the terms of probation (i. e., "obey all laws . . . . "). 4/

2. The rules for ascertaining guilt in a criminal trial do not necessarily apply in a probation revocation hearing. The procedure employed in a probation revocation hearing rests within the broad discretion of the trial Court.

Bennett v. United States, 158 F. 2d 412, 414 (8th Cir. 1946), cert. denied, 331 U. S. 822 (1947);

Jianole, supra, at 117.

In such a proceeding, the test is whether the evidence is sufficient to reasonably satisfy the judge that the conditions of probation have been violated.

Manning v. United States, 161 F. 2d 827, 829 (5th Cir. 1947), cert. denied, 332 U. S. 792 (1947).

The violation need not be established by proof beyond a reasonable doubt.

Bernal-Zazueta, supra, Footnote 6 at p. 68;

Manning, supra, at 829.

4/ Of course, a criminal conviction would not be required in order to prove that the probationer violated the criminal law and thus violated conditions of probation.

Bernal-Zazueta v. United States, 225 F. 2d 64, 68 (9th Cir. 1955);

Jianole v. United States, 58 F. 2d 115, 117-18 (8th Cir. 1932).

The determination of whether or not probation should be revoked is governed by the exercise of sound discretion by the trial Court.

Burns v. United States, 287 U.S. 216, 221, 222 (1932);

Escoe v. Zerbst, 295 U.S. 490, 493 (1935);

Brown v. United States, 236 F.2d 253, 254 (9th Cir. 1956), cert. denied, 356 U.S. 922 (1958);

Reed v. United States, 181 F.2d 141, 142 (9th Cir. 1950), cert. denied, 340 U.S. 879 (1950).

The decision of the trial Court in a probation revocation proceeding will not be disturbed upon appeal in absence of an abuse of discretion.

Kirsch v. United States, 173 F.2d 652, 655 (8th Cir. 1949);

Manning v. United States, supra, at 829.

It was entirely proper for the trial Judge to consider the evidence that he had heard during appellant's previous criminal trial.

Bernal-Zazueta, supra, at p. 68.

This evidence showed that one Jose De La Rosa entered the United States from Mexico with approximately two ounces of heroin in his pocket [R. T. 98-99, 103, 139-40]. He also had a piece of paper containing appellant's last name and telephone number and the word,

"Important" (in Spanish) [R. T. 107]. De La Rosa arranged for a meeting with appellant [R. T. 174-77]. When the meeting occurred, appellant and De La Rosa had a conversation from which it would naturally be inferred that heroin was the subject of the discussion [R. T. 149-50, 152-54].

Appellant asked, "Is that all you could get?" De La Rosa answered that he had his part. De La Rosa asked, "Where is your kit?" Appellant stated that he did not have it with him and indicated that he was going home to "fix up" (take some narcotics) [R. T. 150, 153].

"Kit" is a word sometimes used to describe the paraphernalia used by a narcotics addict for the injection of heroin [R. T. 200].

Appellant was arrested with heroin in his pocket [R. T. 111-12].

In the subsequent probation revocation proceeding, it was alleged that appellant had violated his probation in connection with crimes involved in the sentence of February 11, 1966 [R. T. 5]. (The evidence in regard to the "kit" also showed a violation of California Health and Safety Code, Section 11555.)

The Court also noted that there was evidence of an intended use of narcotics [R. T. 8]. This alone would constitute a violation of probation. Although appellant distinguishes between "use" and "intended use", the distinction is not important. In Dillingham v. United States, 76 F. 2d 35 (5th Cir. 1935), the defendant was charged with a violation of probation involving the fact that he was

a fugitive from justice. There apparently was no specific probationary condition prohibiting him from becoming a fugitive from justice. The Court of Appeals affirmed the judgment of revocation:

> "It is enough that it be made sufficiently to appear that the probationer has not conducted himself in accordance with his duty as a probationer." (at p. 36).

Consequently, an intended use of narcotics would constitute a violation of probation in the instant matter.

Although appellant has raised some highly ingenious argument relating to admissibility of evidence, it is respectfully submitted that the trial Court did not abuse its discretion in the revocation proceeding.

VI

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the Court below should be affirmed.

Respectfully submitted,

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Attorneys for Appellee,
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CERTIFICATE

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Phillip W. Johnson
PHILLIP W. JOHNSON